

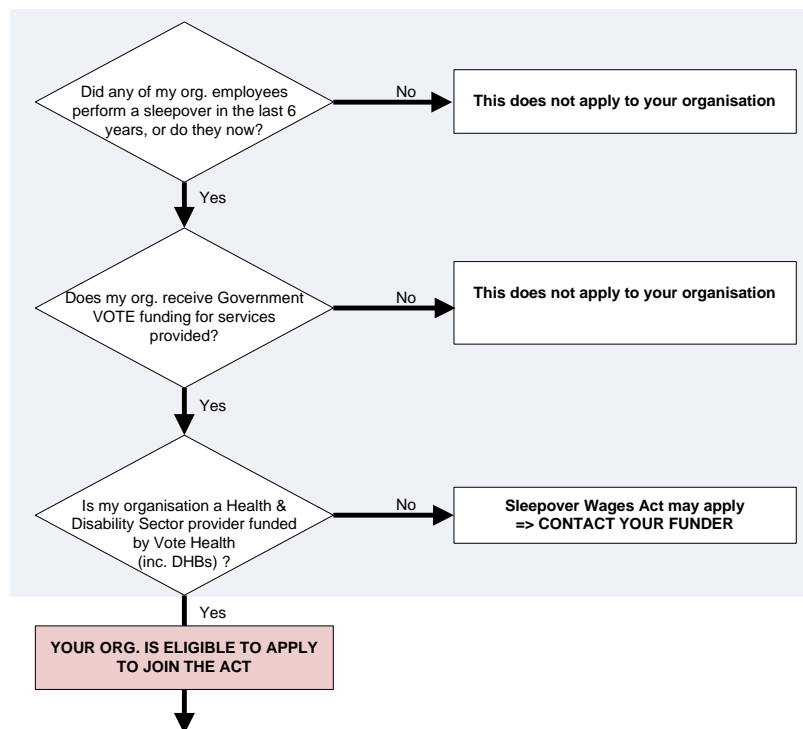
FAQs on Sleepover Settlements - for Employers

These FAQs only apply to Employers who are health and disability service providers funded by Vote Health

This information is intended as a guide for employers who are health and disability service providers funded by Vote Health only. Every effort has been made to ensure that it is accurate. However, in the event of any dispute, Government policy and legislation, including the Sleepover Wages (Settlement) Act 2011, will take precedence.

If the answers below do not answer your question, email the question to projects@nzdsn.org.nz or call 04 4999876

1. How does the Sleepover Wages (Settlement) Act 2011 apply to my organisation?



Settlement Process

2. How can I be covered by the Act?

The diagram on the following page sets out the process for Employers to reach a settlement and be covered by the Act. The key steps are:

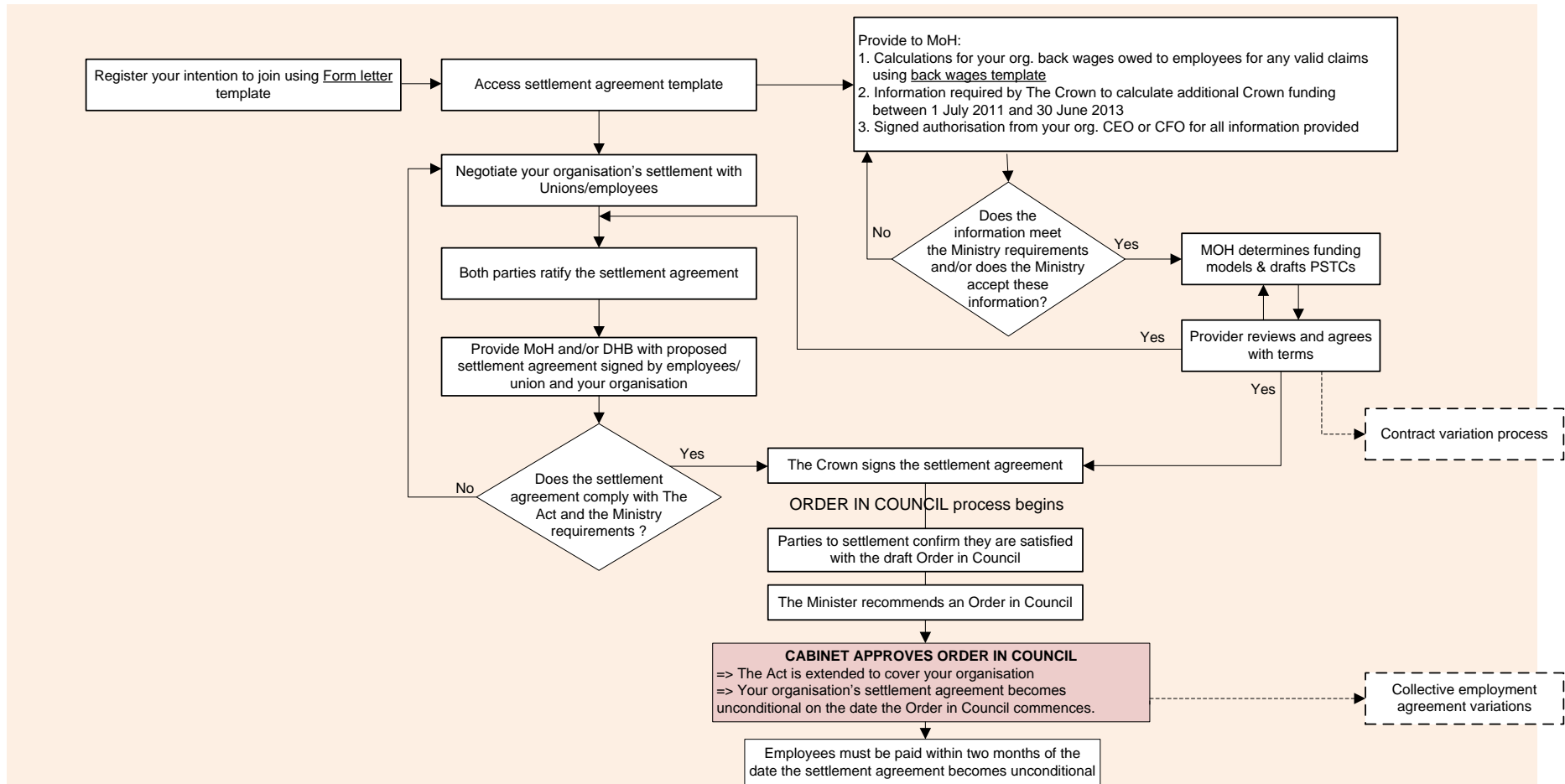
- a. Register your intention to join the Act with the Ministry of Health. This will allow the Ministry to assist you with information requirements and contractual changes more readily.
- b. Negotiate a proposed settlement agreement with your employees and their unions and/or their nominated representatives.
- c. Provide all information required by the Ministry of Health.
- d. Ratify the settlement yourself, and have it ratified by employees and the Crown.
- e. Provide proposed settlement agreement (signed by both parties) – for the Crown to sign and to be used as the basis for commencing the Order in Council process.
- f. Both parties to review and confirm satisfaction with the draft Order in Council.
- g. Order in Council made.
- h. Settlement agreement becomes unconditional from date on which the Order in Council comes into force.

Please note that a union representing employees must follow its own process for its members to ratify the proposed settlement. Other employees, if not signing individually, will need to agree who to appoint as their representative(s). You must endeavour to get agreement from all of their employees (or representatives). If you and your employees cannot reach a settlement, you should contact the Ministry of Health for further information on possible options.

3. What is an Order in Council?

Orders in Council are a type of Regulation, made by the Governor-General on the advice of the Government. In this case, an Order in Council will be used to give effect to your settlement and extend the Act to you and your employees.

Settlement Process



4. When do I have to be covered by?

At this stage, there is no cut off date for employers to join the Act. But, the Act expires on 19 October 2016. It is expected that most employers will have registered by 30 April 2012, and most will have joined the Act by 30 June 2012.

5. What if I don't want to reach a settlement and be covered by the Act?

Each employer has a choice about whether they decide to join the Act or not.

If you are Eligible to join the Act (see Diagram 1), but do not do so:

- you are required to pay your employees 100% of the hourly minimum wage for all sleepovers performed from 18 October 2011
- you will not be eligible for Crown funding towards backwages or the transition period between 1 July 2011 and 30 June 2013
- your employees cannot make any future claims for backwages, but you are required to pay employees with valid claims that were lodged with the Employment Relations Authority by 5pm on 2 September 2011 their full backwages entitlement.

Backdated liability

6. If I join the Act what backwages are my employees who qualify for backwages entitled to receive?

Current and Recent Employees

- The outstanding liability for each sleepover
- 8% annual leave on the liability for each sleepover.

Hence, employers are required to pay all qualifying employees (Q.7) fifty percent (50%) of:

- the difference between the applicable minimum wage rate payable for the hours worked and the allowance you actually paid for each eligible sleepover, **AND**
- the difference between:
 - the amount you actually paid for annual leave taken by the employee in relation to the sleepover and
 - the amount you would have paid for annual leave if you had paid the applicable minimum hourly rate for the sleepover

How do I calculate the backwages payable to qualifying employees?

For each sleepover performed from 1 July 2005 to 30 June 2011, the backwages payable are calculated on the following basis:

$$(((a \times 9) - b) + c) \times 0.50 = d$$

Where –

- a is the minimum hourly rate of wages payable under the Minimum Wage Act at the time the sleepover was performed
- b is the amount of taxable allowances you actually paid to the employee for the sleepover
- c. in relation to the sleepover, is the difference between –
 - (a) the amount you would have paid in respect of annual leave taken by the employee had the applicable minimum hourly rate been paid for the sleepover, and
 - (b) the amount you actually paid to the employee in respect of annual holidays taken by the employee
- d. is the gross amount of backwages payable to the employee before tax is withheld

Historic employees

Some employees may be eligible for the payment of backwages from the period of 1 June 2004 to 1 July 2005. This may be in addition to backwages received as a 'recent' or 'current' employee.

Historic employees who meet the eligibility criteria above are to be paid for sleepovers performed in the period above, using the same backwages formula.

7. Who is a qualifying employee?

Qualifying employees are:

- **Current employees** who:
 - filed a claim with the Employment Relations Authority for sleepovers before 5 pm on 2 September 2011, and
 - worked sleepovers between 1 July 2005 and 30 June 2011.
- **Recent employees** (meaning an employee that left your employment at any time from 1 July 2005 to 17 October 2011) who:
 - filed a claim with the Employment Relations Authority for sleepovers before 5 pm on 2 September 2011, and
 - worked sleepovers between 1 July 2005 and 30 June 2011.
- **Historic employees** (meaning an employee that left your employment during the period from 1 June 2004 to 30 June 2005) who:
 - filed a claim with the Employment Relations Authority for sleepovers before 5 pm on 2 September 2011, and
 - worked sleepovers no earlier than 1 June 2004 during the six year period immediately before the date on which he or she lodged a claim for sleepover wages.

8. Will the Crown contribute to my liability to pay backwages?

If you join the Act, the Crown will contribute not less than 50% of the amount payable by you for backwages from 1 July 2005 to 30 June 2011, as set out at Q.6 above.

The Crown has set aside a fixed amount for its contribution towards backwages claims for employers who join the Act and will pay to each employer a proportion of that amount that is equivalent to the proportion of the value of the total claims amount that relates to claims made against that employer.

9. Would I know if any of my employees had lodged a claim for sleepover wages with the Employment Relations Authority?

Yes you would. When an employee lodges a claim with the Employment Relations Authority, the Authority will send a letter to you (as the employer concerned or “the respondent”) informing you that a claim (statement of problem) has been lodged and seeking your response.

If your employee has lodged a claim, you should have received a letter from the Authority. If you have any doubts, you could contact the Employment Relations Authority and enquire about whether there have been claims lodged by any of your employees.

Future arrangements for payment of sleepovers from 1 July 2011

10. Am I required to pay the full minimum wage to my employees for sleepovers?

Yes, unless you join the Act. If you are a health and disability sector provider that is eligible to join the Act, but do not do so, you will be required to pay 100% of the minimum wage from 18 October 2011.

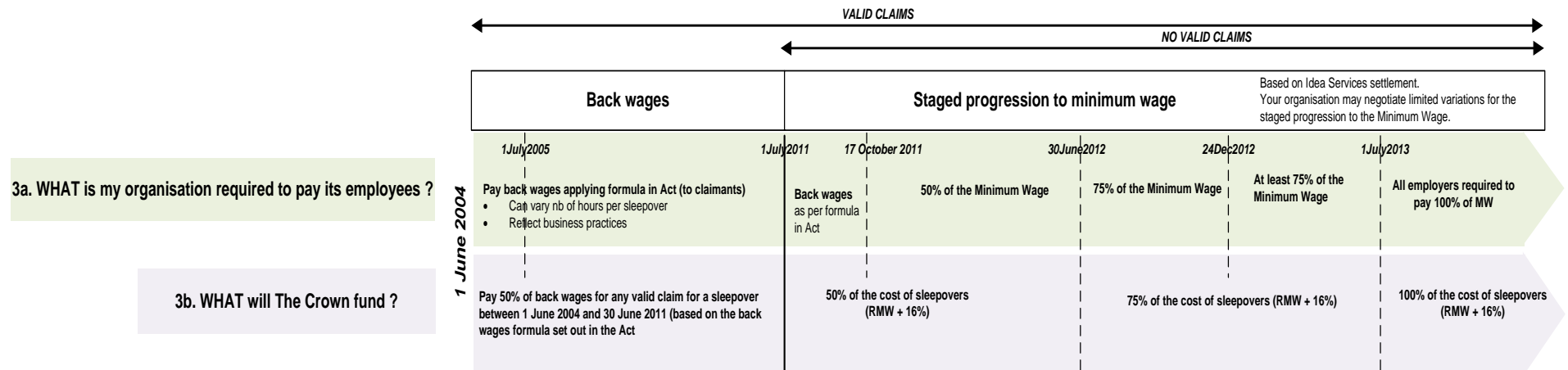
If you join the Act you will be required to make a staged progression towards paying the full minimum wage. The staged progression under the Act is:

1 July 2011 – 17 October 2011	Calculated as per back wages (see Q.6)
18 October 2011 – 30 June 2012	50% of the minimum wage
1 July 2012 – 24 December 2012	75% of the minimum wage
From 25 December 2012 (or 30 June 2013 at the latest) – ongoing	100% of the minimum wage

Note that the Act allows for some changes to be made to this stepped process but **only if** this means employees receive at least the same or more pay than they did before the day the Order in Council comes into force and you begin paying 100% of the minimum wage before 1 July 2013.

11. What funding will I receive from the Crown during the phase in period?

If you join the Act, the Crown will fund in the following way:



Other questions

12. Does the Act cover all affected staff, and in particular non-unionised staff?

Yes, the Act (and any settlement) applies to all of your staff who performs sleepovers.

13. I have previously provided information to the Ministry about sleepovers. How does this relate to the settlement process?

The information on backwages liability that you provided to the Ministry was required to inform a possible settlement deal that was being negotiated at the time, and give an estimate of the total liability for all current employees.

14. Does the Act extinguish claims for more than 50% of backwages?

See Q.6 above.

15. Is the Crown's funding for me to make a staged progression to paying towards the minimum wage the total amount required? What will happen beyond June 2013?

Under the Settlement Agreement, the Crown will fund you after 30 June 2011 as follows:

- a. 50% of the cost of Sleepovers from 1 July 2011 to 30 June 2012
- b. 75% of the cost of Sleepovers from 1 July 2012 to 30 June 2013
- c. 100% of the cost of Sleepovers from 1 July 2013.

The "cost of sleepovers" is based on the total number of sleepovers undertaken on behalf of the Employers for the year ending 30 June 2011 at the minimum wage that applied at the time the sleepover was performed plus 16% (being an allowance for various employee entitlements).

There are two periods during the staged progression to the minimum wage, when the funding from the Crown may be less than the payments employers are required to make to their employees. These are:

- From 1 July 2011 to 17 October 2011, where the Settlement Agreement requires you to pay wages to all your employees who performed sleepovers during that period (using the calculation for backwages set out in the Act). The Crown will only fund 50% of the cost of sleepovers during this period.
- From 25 December 2012 to 30 June 2013, where the Settlement Agreement proposes that you pay 100% of the minimum wage from 25 December 2012. The Crown will only fund 100% of the cost of sleepovers from 1 July 2013.

Note that, under the Act, parties can agree to provide a different process for achieving a staged progression to the minimum hourly rate of wages.

The Crown will fund you 100% of the cost of Sleepovers from 1 July 2013

16. How far back does the backwages settlement go?

See Q.6 above

17. Can a claimant opt out? Up until when?

An employee can opt of a claim for backwages by withdrawing their claim at any time before you reach a settlement.

18. If a former employee has made a claim, what am I obliged to do? How do I contact them?

If they are a union member, contact the Union and get contact details from them.

19. Do I need all employee information before I make a claim?

Yes, you will need to have up to date contact information for employees and ensure you can make payments according to the timeframes agreed in your settlement. The Ministry will be auditing providers in 2012 to ensure funding has been paid to employees

20. What is my responsibility for paying backpay to employees who have not made an eligible claim for backpay?

Under the Act, you are not obliged to pay back pay for the period before 1 July 2011 to employees who did not lodge a valid claim on or before 5pm on 2 September 2011. The Act does not, however, stop employers from contributing to back pay for employees who did not lodge valid claims. (See also Qs 5 – 7 above)

21. What do I do if the services I deliver are funded by a government agency other than the Ministry of Health, such as a District Health Board, ACC, the Ministry of Social Development or a School Board of Trustees?

If you are funded by a DHB for Mental Health sleepovers please contact:

Robyn Blue
Project Manager, National Services
DHB Shared Services
Phone (04) 803-5822; Mobile (027) 444-1659
Robyn.Blue@nationaldhbs.health.nz

If you are not funded through Vote Health, please contact your funder directly.

22. Which employees need to be party to an agreement?

All your employees who perform, or performed, sleepovers should be party to the settlement agreement or nominate a representative (such as their union) to be party to it on their behalf.

23. Which employees must vote on any proposed agreement and how does it work if union members only make a small proportion of my employees who perform sleepovers?

A union that is representing employees will follow its own process for its members to ratify the proposed settlement. Other employees, if not signing individually, will need to agree who to appoint as their representative(s). Employers must endeavour to get agreement from all of their employees (or representative). If an employer and its employees (or their representative) cannot reach a settlement, they should contact the Ministry of Health for further information on possible options. This may include the government imposing a settlement, if a majority of MPs in Parliament agree to the settlement terms to be imposed.

24. Guidance around the Settlement Agreement

The Ministry has provided a Settlement Agreement template, based on the settlement reached by IDEA Services and the Act. This can be used as a basis for negotiations between employers and employees and which, if agreed, will meet the criteria for an Order in Council to join the Act.

- Please submit a draft with tracked changes to sleepoversettlements@moh.govt.nz **before parties sign**. This will allow any recommendations for changes to be made before parties sign.
- If you have made changes to the settlement agreement, please tell us what changes you have made, and why you have made them. This may inform further general advice to employers.

The Act allows for limited changes to be made to the terms of the settlement, which can be given effect by an Order in Council:

Parts of the settlement that **cannot** be altered are:

- That the deadline for paying 100% of the minimum wage is no later than 30 June 2013.
- That the formula for calculating back-wages is 50% of minimum wage and annual leave entitlement, less allowances already paid for each 9 hour sleepover. **Except** that “9” can be changed to another number. This is necessary to reflect that most employers have 8 hour sleepovers.

Parts of the settlement that **can** be altered are:

- Changing the stepped process for moving to the minimum wage. But **only if** this means employees receive at least the same or more pay than they did before the Act starts to apply to the employer (and meets the deadline for reaching 100% of Minimum Wage).
- The 2 month deadline for the employer to pay backwages to employees after the Order in Council comes into force, but **only if** a majority of employees agree.

Clause 1.5 – it is suggested that the earliest date be **30 June 2012** to allow Order in Council timeframes to be taken into account.

If you are signing and submitting before:	Add this date to 1.5 of your Settlement Agreement
30 April 2012	30 June 2012
31 May 2012	31 July 2012
30 June 2012	30 September 2012
After 1 July 2012	Please email sleepoversettlement@moh.govt.nz

Clause 3.9 – only include if there are Historic Employees.

Clause 5.2 – only include if there have been settlements with a Union